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In The

Supreme Court of the United States

DAVID R. MCKUNE, Warden
and CHARLES SIMMONS, Secretary,
Kansas Department of Corrections,

Petitioners,

v.

ROBERT G. LILE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, upon an inmate's invocation of his Fifth Amendment right against self-incrimination, transferring him to maximum security and imposing corresponding sanctions constitutes compulsion?

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STATEMENT OF THE CASE

1. Nature of the Case.

Respondent Robert Lile is an inmate in medium security at the Lansing Correctional Facility in Lansing, Kansas. He refuses to incriminate himself by participating in Kansas' sexual abuse treatment program ("SATP"). The State violates Mr. Lile's Fifth Amendment right against self-incrimination because it demands incriminating information. The State, despite contending that SATP is voluntary, compels such admissions by threatening sanctions.[1] Mr. Lile can choose to admit crimes and face prosecution or remain quiet and be punished for his silence.

2. Prison Policies and Classifications.

Mr. Lile was convicted of rape, aggravated sodomy, and aggravated kidnapping in 1983. *State v. Lile*, 699 P.2d 456, 457 (Kan. 1985). Mr. Lile pled not guilty and testified at trial. Because Mr. Lile was convicted of a sex offense, the State added SATP to his Inmate Program Agreement

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[1] Mr. Lile also objected to the State's use of penile plethysmograph testing in SATP. The State's penile plethysmograph testing involves "a pressure-sensitive ring which is placed around a subject's penis to measure and record increases in penis size in response to various audio recordings of projective sexual scenarios presented from the perspective of a person committing a sexual offense." Petitioners' Appendix ("Pet. App.") 47a. Mr. Lile argued that this intrusion violated his right to privacy. *Id.* The District Court disagreed, Pet. App. 54a, and the Tenth Circuit found Mr. Lile's claim moot once it found in his favor on his Fifth Amendment claim. Pet. App. 32a.

in 1994. Pet. App. 3a-4a. As part of SATP, the State demanded that Mr. Lile sign a form entitled "Admission of Guilt" which acknowledges that he committed the crimes for which he is in prison. Joint Appendix ("J.A.") 30.[2]

The State also provided Mr. Lile with an "Abbreviated Sexual History Form," which asked him to list every victim "you have molested or otherwise offended against." J.A. 32-33. The form also asked Mr. Lile to "[b]e sure and list every different act you did with this victim(s). Did you have any intercourse, oral sex, digital penetration and/or any other combination, etc." J.A. 32. The form also asked for the victim's name, age, relationship to the inmate, and where the act occurred, and "to be explicit in detail. . . . " J.A. 32. In case he needed to catalog additional sexual offenses, the State provided additional forms. J.A. 32. If Mr. Lile had completed this sexual history form, the State would then have checked his statements through polygraph testing. Pet. App. 35a.

When Mr. Lile invoked his Fifth Amendment rights and refused to sign the forms, he automatically became subject to the State's Internal Management Policy and Procedure system ("IMPP"). Under the terms of IMPP, Mr. Lile would have moved from Level III to Level I because of his invocation. J.A. 19; Petitioners' Brief ("Pet. Brief") 6. Transfer to Level I is mandatory for an inmate who refuses to participate in "recommended programs."

---

[2] As a result of Mr. Lile's lawsuit, the State changed the title of its "Admission of Guilt" form to "Admission of Responsibility" and added that SATP was a voluntary program. Pet. App. 34a.

J.A. 19. This is the same sanction imposed for anyone who, while in prison, is charged with a felony or receives a disciplinary conviction for theft, arson, assault, battery, or an aggravated sexual act. J.A. 19-20.

Inmates moved from Level III to Level I receive the following sanctions: (1) they are limited to what they may keep in their cell; (2) they are ineligible to participate in certain prison programming and activities; (3) they cannot receive authorization to send out more than $30.00 per pay period; (4) they are limited to how much they can spend at the canteen; (5) they are limited to how much they can earn per day; and (6) the State restricts their visitation (i.e., instead of receiving visits from anyone, inmates kept at Level I can only receive visits from attorneys, clergy, law enforcement officials, and immediate family). J.A. 27-28.

Petitioner Charles Simmons, the Secretary of the State's Department of Corrections, acknowledges that transfer to Level I is punishment:

> Q. Are inmates who don't obey the rules at the Lansing Correctional Facility punished?
>
> A. Yes.
>
> Q. And how – in what ways are they punished?
>
> A. Well, they're – depends on the classification of the disciplinary rule that they violate. There are three classifications. Level I is the – or Severity Level I is the most severe violations and Level III the least severe, and

there are sanctions that go with each of these.

J.A. 91.

Not only did Mr. Lile face a move to Level I, he also would have been moved from medium security to maximum security. Pet. Brief 6-7. Mr. Lile has fairly free movement within his medium security unit; he maintains a key to his cell and can move throughout his unit between 5:30 p.m. and 8 p.m. J.A. 42-43. In maximum security, the State restricts this movement. J.A. 42. He would be permitted to leave his cell only for scheduled programs, work, meals, or for previously scheduled time in the prison library or grounds. J.A. 42.

Petitioner Simmons recognizes that a transfer to maximum security is punishment:

> Q. So you would agree, then, that a change in a person's housing inside the institution is used as a form of punishment?
>
> A. Through the disciplinary process, it is, yes.
>
> * * *
>
> Q. Has anyone – have you ever had an inmate who was punished in the disciplinary system by being moved from a medium security facility . . . to a maximum security facility?
>
> A. Very definitely. A serious disciplinary violation will – we use the term "bust your custody." It will cost you your custody. And by our classification procedure, you get sufficient points with that disciplinary violation that it will result in your classification being moved from minimum to maybe even maximum security, but certainly from medium to maximum if you get that sort of disciplinary violation.

J.A. 92, 94. Moreover, the State admits violence or danger is more likely in maximum security because "more violent inmates" are housed there. J.A. 96-97.

SUMMARY OF THE ARGUMENT

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. It guarantees a person's right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer *no* penalty . . . for such silence." *Estelle v. Smith*, 451 U.S. 454, 468 (1981) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (emphasis added)).

The State suggests that SATP does not violate the Fifth Amendment because it is a voluntary program. It makes this assertion while at the same time acknowledging that should Mr. Lile invoke his Fifth Amendment rights, the State will transfer him to maximum security and punish him with penalties imposed for only the "most severe violations" in prison. When applied to inmates outside SATP, these sanctions are viewed as punishments; when someone in SATP invokes his constitutional rights, the State suggests that these same punishments are merely the State's way of encouraging participation.

Indeed, Mr. Lile would like to participate in SATP today. He has participated in prison programs before and has benefitted from them. But for Mr. Lile to participate to the State's satisfaction in SATP, he must admit that he committed the crimes for which he was convicted, despite his insistence that he is not guilty. Furthermore, he must list, in exacting detail, all other sexual offenses for which he has never been charged. The State would then gauge the veracity of any such statements through polygraph testing.

If Mr. Lile states that he committed the crime for which he was convicted, the State can prosecute him for perjury. He would also lose any chance he might have for a new trial based upon newly-discovered evidence. If he admits to any previously uncharged sexual offense involving a child, prison officials *must* report him.

The State concedes that it seeks incriminating information from Mr. Lile. It attempts to minimize this by making two points, both flawed. The first is that, to the best of its knowledge, the State has never prosecuted anyone for a previously unreported crime (although the State has conceded that it will report any prosecutable information). Pet. App. 7a.[3] The second is that SATP is

---

[3] Whether an inmate has been charged or prosecuted for previously undisclosed crimes is irrelevant. *See* Pet. Brief. 4. Perhaps no inmate in SATP has ever committed a sexual offense for which he is not currently incarcerated. Perhaps no inmate has decided to be open with such information. The critical point is that the State seeks this incriminating information, and, if it gets it, the State has *no* discretion in deciding whether to report it. *See* Kan. Stat. Ann. 38-1522 (2000). *See also* Op. Kan. Att'y Gen. No. 94-67 (clarifying any ambiguities within this statute by stating that a psychologist employed at a state treatment facility must report any disclosures and communications made during a court-ordered examination by a convicted sex offender regarding the sex offender's suspected sexual abuse or molestation of a child). J.A. 167.

not designed to uncover such information, but is directed at the notion that sexual offender therapy cannot be beneficial unless the prisoner admits responsibility.

There are workable solutions that would enable the State to meet its goals of rehabilitation. As both the District Court and Tenth Circuit ruled, the State can immunize Mr. Lile for any incriminating statements he makes. This protection would ensure the candid exchange that the State claims it needs for SATP. Then, if Mr. Lile chose not to participate, the State could exact the penalties they seek here.

Alternatively, the State could place all sex offenders in maximum security and Level I the moment they arrive at prison. If an inmate wanted to *better* his situation, he could take part in SATP. Doing so might mean that the inmate could move to Level III and minimum or medium security, thereby eliminating the punitive nature of SATP.

Both solutions would uphold the Constitution and allow the State to operate SATP to achieve its stated goals of rehabilitation, without exacting any penalty for Mr. Lile's invocation of his Fifth Amendment rights. The Tenth Circuit's decision was correct, and Mr. Lile respectfully requests that this Court affirm it.

ARGUMENT

I. The State's Operation of SATP Amounts to Unconstitutional Compulsion.

The Fifth Amendment right against self-incrimination is "the mainstay of our adversary system of criminal justice." *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966). It is to be "broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom." *In re Gault*, 387 U.S. 1, 50 (1967); *see also Maness v. Meyers*, 419 U.S. 449, 461 (1975) ("This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action.").

Mr. Lile agrees with the State that this case hinges on whether the State's system of sanctions amounts to unconstitutional compulsion under the Fifth Amendment. *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (quoting *Feldman v. United States*, 322 U.S. 487, 489 (1944)) (citations omitted) ("This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, must be accorded liberal construction in favor of the right it was intended to secure.").

In this case, Mr. Lile faces compulsion. The State demands participation in SATP and, at the same time, demands that Mr. Lile surrender his Fifth Amendment rights. It forces compliance through sanctions and the real prospect of personal violence. This Court should not permit the State to punish inmates like Mr. Lile, especially when simple alternatives exist that would not only

preserve the Fifth Amendment but improve the efficiency of SATP.

A. A Fifth Amendment claim does not require a liberty interest.

The State argues that this Court should employ its liberty interest test under the Due Process Clause of the Fourteenth Amendment from *Sandin v. Conner*, 515 U.S. 472 (1995), when analyzing "compulsion" within the self-incrimination privilege of the Fifth Amendment. In *Sandin*, this Court held that prison segregation does not rise to the level of a protected liberty interest under the Due Process Clause unless it imposes "atypical" and "significant" hardships on the inmate in relation to the ordinary incidents of prison life. *Id.* at 486.

This Court in *Sandin* reasserted its central holding from *Meachum v. Fano*, 427 U.S. 215 (1976), that the Due Process Clause of the Fourteenth Amendment does not require a hearing before a prisoner is transferred from one state prison to another having harsher conditions, unless a state law or practice creates a liberty interest in continued confinement at the first prison. *Sandin*, 515 U.S. at 483. Leaping from *Sandin*'s due process analysis to self-incrimination, the State, in turn, urges that "the touchstone for unconstitutional compulsion in the prison setting is the imposition of atypical hardships." Pet. Brief 15. Courts considering analogous claims have reached the opposite conclusion.

For example, in analyzing *Meachum*, the First Circuit Court of Appeals declined to rely on the dicta cited by the State in its brief that "prison officials have discretion

to transfer [prisoners] for whatever reason or no reason at all." *Furtado v. Bishop*, 604 F.2d 80, 87 n.6 (1st Cir. 1979). The court explained that "we understand this statement to describe the applicable Massachusetts law in that case and not to constitute a pronouncement that a transfer can never violate the Constitution." *Id.* The court in *Furtado* held that nothing in this Court's due process decisions "expressly ruled out a challenge to a transfer to segregation on the ground that it violated constitutional rights other than the right to procedural due process of law." *Id.* at 87.

In fact, in the sister case to *Meachum* that was before this Court at the same time, *Montanye v. Haymes*, 427 U.S. 236 (1976), this Court noted that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him *and is not otherwise violative of the Constitution*, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Id.* at 242 (emphasis added); *see also Olim v. Wakinekona*, 461 U.S. 238, 248 n.9 (1983) (citing *Montanye*, this Court reiterated that a state may place an inmate in any penal institution unless "the reason for confining the inmate in a particular institution is constitutionally impermissible").

Other courts have interpreted *Meachum* similarly. As the Tenth Circuit Court of Appeals noted in *Frazier v. DuBois*, "*Meachum* addressed only the Due Process Clause, and it did not preclude the possibility that a transfer might violate other constitutional provisions." 922 F.2d 560, 561 (10th Cir. 1990).

> "While a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution."

Id. at 561-62 (citing *Murphy v. Missouri Dep't of Corr.*, 769 F.2d 502, 503 (8th Cir. 1985)).[4]

In *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978), an inmate claimed that the state transferred him to another, less desirable prison because he was performing legal services for other inmates. As the State does in its brief, Indiana argued that it could transfer an inmate "for whatever reason or for no reason at all." The Seventh Circuit disagreed, noting that "while plaintiff may not have a due process interest or expectation in remaining at the

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[4] *See also Meriwether v. Coughlin*, 879 F.2d 1037, 1045 (2d Cir. 1989) (citing *Meachum* and *Montanye*, the court stated that while officials have discretion to transfer prisoners, "[t]hey may not, however, transfer them solely in retaliation for the exercise of their constitutional rights."); *Jackson v. Cain*, 864 F.2d 1235, 1248 n.3 (5th Cir. 1989) ("It is important to note that the prison officials could have transferred Jackson to any job for almost any reason or no reason at all, and he would have had no claim. But while this decision may be arbitrary, it may not be retaliatory against Jackson's exercise of constitutional rights."); *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir. 1979) (holding that "[a] prisoner does not have a right to a hearing before being transferred; indeed he can be transferred for no reason at all. . . . However, he may nevertheless establish a claim under § 1983 if the decision to transfer him was made by reason of his exercise of constitutionally protected First Amendment freedoms, . . . ").

same institution, he does have a First Amendment interest or expectation in not being punished for the exercise of activity protected under that provision." *Id.* at 229-30. *See also Kimberlin v. Quinlan*, 199 F.3d 496, 501 (D.C. Cir. 1999) ("*Sandin* did not change the law regarding whether a prison official violates a prisoner's right under the First Amendment by segregating the prisoner because of the content of a prisoner's communication with the media. . . . ").[5]

As the discussion above illustrates, the State's assertion that a liberty interest under the Due Process Clause must be at stake in order to find any constitutional violation has been repeatedly rejected by courts considering that issue. Most compelling, though, is the passage in *Sandin* that rejects just such an assertion:

> Prisoners such as Conner, of course, retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.

Sandin, 515 U.S. 472, 487 n.11.

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[5] *See also Allah v. Seiverling*, 229 F.3d 220, 224 (3d Cir. 2000) (rejecting attempt to extend *Sandin* to non-due process claim: "Nor does *Sandin* preclude Allah's claim alleging that he was kept in administrative segregation in retaliation for filing civil rights suits against prison officials. . . . Retaliation may be actionable, however, even when that the retaliatory action does not involve a liberty interest."); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Pratt v. Rowland*, 65 F.3d 802, 806-807 (9th Cir. 1995).

Notwithstanding this Court's own conclusion that its *Sandin* test will not apply to claims beyond the realm of the Due Process Clause, the State cites *Sandin* to support its assertion that: "Changing or withholding prison privileges in which an inmate has no constitutionally protected liberty interest, or subjecting an inmate to prison conditions that are not atypical, generally cannot violate the Constitution." Pet. Brief 11. The Tenth Circuit rightly rejected the State's attempt to expand *Sandin*'s liberty interest test to the arena of the self-incrimination privilege: "[N]owhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." Pet. App. 14a.

Because many lawsuits filed by prisoners involve allegations of multiple constitutional violations, courts have separately analyzed the due process claims under *Sandin* but reviewed the non-due process claims according to this Court's past rulings on those individual claims.[6] The Tenth Circuit accordingly noted: "From our

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[6] *See, e.g., Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (analyzing due process claim under *Sandin*, examining First Amendment and Eighth Amendment claims without resorting to *Sandin*); *Orellana v. Kyle*, 65 F.3d 29, 32 (5th Cir. 1995) (analyzing prisoner's due process claim under *Sandin* but not analyzing his claim of a violation of the *ex post facto* clause under *Sandin*, stating "while, as *Sandin* noted, prisoners retain constitutional remedies under the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment, . . . the ambit of their potential Fourteenth Amendment due process liberty claims has been dramatically narrowed."); *Rimmer-Bey v. Brown*, 62 F.3d 789, 791 n.4 (6th Cir.

review of the cases, *Sandin* has not been expressly used to analyze any kind of constitutional right claimed by a prisoner other than a due process violation." Pet. Brief 14a.

Even one of this Court's most recent decisions on the Fifth Amendment underscores the State's misplaced reliance on *Sandin*. This Court's 1998 decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 283 (1998), involved both a due process claim and a Fifth Amendment self-incrimination claim raised in the context of a prison setting. This Court used *Sandin* solely for its analysis of the due process claim, not for Mr. Woodard's Fifth Amendment claim of self-incrimination. The *Woodard* Court might have reasoned that because Mr. Woodard had no liberty interest in clemency, there was no self-incrimination violation, but it did not.

There is no precedent, nor any reason, for this Court to adopt a liberty interest standard for Fifth Amendment claims.

B. The State penalizes Mr. Lile for invoking his Fifth Amendment rights.

The sanctions involved are plainly penalties. As this Court explained in *Spevack v. Klein*, 385 U.S. 511, 515 (1967), " 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly.' " *See also*

1995) (using *Sandin* to analyze procedural due process claim but not for prisoner's substantive due process claim).

Lefkowitz v. Turley, 414 U.S. 70, 82 (1973) (holding that penalties include the loss of employment); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280, 283-85 (1968) (holding that discharge for invoking right against self-incrimination impaired Fifth Amendment privilege); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (holding that penalty of discharge for reliance on right to remain silent compelled policemen's incriminating testimony because it foreclosed a free choice to remain silent); *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977) (depriving attorney of position as an unpaid political party officer would "impinge on his right to participate in private, voluntary political associations").

The Fifth Amendment would have a different place in jurisprudence and history if its protections were potent only in the face of torture. *See infra*, Section III. This Court has explained that a "free and voluntary" statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)).

The State acknowledges that this Court has found Fifth Amendment violations even though torture and imprisonment were not involved, but it attempts to distinguish those cases by suggesting that its interests override those of Mr. Lile. This Court has rejected similar claims made by government officials. *See Turley*, 414 U.S. at 78 ("claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well").

In fact, in *Cunningham*, Chief Justice Burger, speaking for the Court, repeated the reasoning from *Turley* that the Fifth Amendment privilege against self-incrimination will rarely, if ever, yield to an overriding government interest:

> We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a government need. Government has a compelling interest in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity*, *Gardner*, and *Sanitation Men*, where alternative methods of promoting state aims were no more apparent than here.

Cunningham, 431 U.S. at 803 (citations omitted).

The State suggests that because Mr. Lile is an inmate, this Court must review his Fifth Amendment claim under a lesser standard. However, the State's interest in *Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991), identical to the one claimed here, did not fare well:

> [T]he state's rehabilitative purpose in compelling [Mace] to admit [his crimes] . . . is misplaced, because what is at issue is the disclosure, not the purpose of the disclosure. Certainly the state has a legitimate rehabilitative purpose in demanding full disclosure, but that does not make the disclosure any less incriminating.

Mace, 765 F. Supp. at 852.

If Mr. Lile's status as an inmate changes this Court's Fifth Amendment analysis, this Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987), aptly addresses this. The

State's concern that Mr. Lile's claims should be viewed differently because of his status as an inmate is handled ably by this Court's four-factored analysis set forth in *Turner*. *See infra*, Section IV.

C. A bright-line rule is impractical and unnecessary.

The State urges this Court to set a bright-line rule so prison officials may run their programs without fear of litigation. The State asks this Court to adopt a "liberty interest" standard from *Sandin* and apply it to self-incrimination claims in a prison.

The State criticizes the Tenth Circuit's ruling for adding unwanted "new layers" to *Sandin*. Pet. Brief 22. However, because *Sandin* involved a due process violation and Mr. Lile did not raise any due process claims, there cannot be any "new layers" added to *Sandin*. Moreover, a bright-line rule under which constitutional violations could not exist in prison absent a finding of a liberty interest contradicts *Sandin*. Again, even though the inmate had no liberty interest to support his due process claim, he would still be able to "invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate . . . ," and he could "draw upon internal prison grievance procedures and state judicial review where available." *Sandin*, 515 U.S. at 487 n.11 (1995).

Arguing that a liberty interest rule is especially appropriate when the sanctions imposed upon Mr. Lile are nonpunitive, the State forgets that its sanctions are

punitive.[7] Moving Mr. Lile to maximum security and Level I is punishment, and the State's witnesses concede that important fact. J.A. 91-92, 94, 96-97. The State also recognizes the high value inmates place on a preferred housing assignment in the prison, lending even further weight that a housing assignment can be coercive of an inmate's decision to waive his Fifth Amendment rights and enter into SATP. In a March 23, 1995, internal memorandum to all prisoners, Petitioner McKune wrote:

> Indeed, the Medium Facility has long been recognized as a preferred housing location for inmates with medium custody due in part to the nice gymnasium, open yard area, and the individual rooms within the pods K-L-M Units. It seems quite reasonable to expect that inmates who are responsible enough to live there to be responsible enough to participate in their program agreements and or program plans.

J.A. 83.

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[7] Allowing the State to determine whether its actions are "punitive" for considerations of the Fifth Amendment is self-serving, and this Court should look beyond such transparent labels. *See, e.g., Buise v. Hudkins*, 584 F.2d 223, 229 n.8 (7th Cir. 1978) ("The test for whether a transfer is sufficiently punitive would not be whether the prison officials deemed it punitive. Rather it would be an inquiry into, among other things, the relative conditions in the institutions and the harm of dislocation itself, and how the inmate perceived them."); *Carlo v. Gunter*, 520 F.2d 1293, 1294 (1st Cir. 1975) ("The fact that [the inmate's] transfer was denominated an administrative reclassification rather than a punitive transfer is of no moment where the impact on the inmate is the same.").

In *Kerr v. Farrey*, 95 F.3d 472, 479-80 (7th Cir. 1996), prison officials transferred an inmate from a minimum-security facility to a medium-security facility for refusing to participate in a Narcotics Anonymous ("NA") rehabilitation program. The Seventh Circuit ruled that "significant penalties" were meted out by the prison because the inmate raised First Amendment freedom of religion objections to the prison's NA program and refused to participate in the rehabilitative program:

> On the record as it comes to us, it is also undisputed that [the inmate] was subject to significant penalties if he refused to attend the NA meetings: *classification to a higher security risk category* and adverse notations in his prison record that could affect his chances for parole.

Kerr, 95 F.3d at 479 (emphasis added). The Seventh Circuit said that it "easily" found the State was "coercing" the inmate to enter into the rehabilitation program. *Id.* Mr. Lile is coerced no less by the State.

The State asks for a workable test to protect its ability to administer SATP and other prison programs.[8] This Court has provided such a framework in *Turner*. If the prison maintains a program that impinges upon constitutional rights, it may still operate that program "if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. This is the best approach to a

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[8] The State wrongly suggests that the Tenth Circuit's decision could undermine its ability to administer "other programs" in the prison. The State has never presented evidence that other prison programs like alcohol and narcotic rehabilitation or GED training require an admission of guilt or confession of uncharged offenses.

constitutional claim in the penal system. There are hundreds of prisons in the country and even more organized programs within those facilities. These programs have different goals and interests and will attempt to achieve those goals through different ways. There should be no "bright-line" or "one-size-fits-all" constitutional test here. The *Turner* analysis provides the flexibility needed for challenged prison regulations, while giving appropriate deference to prison officials.

II. The Prison Conditions in Question Constitute Compulsion.

A. Fifth Amendment case law does not support the State's position.

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), this Court determined that Ohio's clemency procedures for death row inmates did not violate the Fifth Amendment right against self-incrimination. In *Woodard*, an inmate sentenced to death in Ohio could request a clemency hearing 45 days prior to his scheduled date of execution. *Id.* at 276. Before that hearing, the inmate could meet with a parole board member for an interview. *Id.* at 277.

Mr. Woodard objected that the voluntary interview violated his Fifth Amendment rights because it did not permit him to bring counsel or grant him immunity for his statements. *Id.* at 285. This Court, though it assumed that parole officials would draw adverse inferences from his silence, ruled that this clemency interview was voluntary. *Id.* at 286.

> Here, respondent has the same choice of providing information to the Authority – at the risk of damaging his case for clemency or for post-conviction relief – or of remaining silent. But this pressure to speak in the hope of *improving his chance* of being granted clemency does not make the interview compelled.

Id. at 287-88 (emphasis added).

It was also important that Ohio was under no obligation to offer any such clemency review to death row inmates. Ohio's constitution "gives the Governor the power to grant clemency upon such conditions as he thinks proper." *Id.* at 276. If Ohio wanted to base clemency soley on what the governor and his advisor thought, the constitution would not be offended. That Ohio sought to do more – to extend a sizeable *benefit* to inmates – distinguishes *Woodard* from the present case.

In SATP, the State imposes penalties rather than offering benefits. Inmates who participate subject themselves to *additional* criminal charges and are kept in the same level and place in the prison. Those who do not participate are punished – sent to maximum security and dropped to Level I. *Woodard* cannot justify the sanctions imposed by the State for not participating in SATP.[9]

The State is stunned that the Tenth Circuit ruled SATP unconstitutional when this Court found no Fifth

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[9] If the State wants to rely on *Woodard*, it should make participation in SATP truly voluntary, without sanctions, and allow inmates to *better* their position in prison with promised benefits, not threatened punishments. *See infra*, Section IV.c.

Amendment violation in *Woodard* even though Mr. Woodard faced a loss of life. Pet. Brief 23-24. Undoubtedly, there can be no argument that suffering a transfer to maximum security and resultant sanctions pale in comparison to the loss of life. However, while this is a dramatic claim, the State ignores that Mr. Woodard would have received a possible benefit for participating in the clemency interview. The Tenth Circuit correctly noted that Mr. Woodard could *improve* his stay if he took part in the interview, and, even if he did not take part, clemency did not hinge on this refusal. Pet. App. 20a-21a. Mr. Lile receives no incentive to participate in SATP; instead, he is punished for invoking the Fifth Amendment.[10]

The Tenth Circuit also correctly distinguished *Minnesota v. Murphy*, 465 U.S. 420 (1984), finding that Mr. Murphy was not required to disclose incriminating information. Pet. App. 22a. In *Murphy*, this Court found no Fifth Amendment violation because Mr. Murphy never invoked his Fifth Amendment privilege against self-incrimination, but spoke freely:

> Thus it is that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence must assert the privilege rather than answer if he desires not to incriminate himself. . . . [I]f he

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[10] Furthermore, Mr. Woodard, despite his unwillingness to participate in a clemency interview, was still considered for clemency through Ohio's clemency review process. *Woodard*, 523 U.S. at 276. In fact, at stake for Mr. Woodard was *not* the loss of his life, but rather, as this Court noted, the loss of the opportunity to "improve his chances of being granted clemency." *Id.* at 287-88.

> chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would *suffer no penalty* as a result of his decision to do so.

Id. at 429 (emphasis added).

The State argues that "atypical prison conditions" should be the touchstone of compulsion analysis, citing *Murphy* for its proposition that a "threat of revocation of parole" does not "amount to unconstitutional compulsion." Pet. Brief 12. The State, however, misreads *Murphy*, which held just the opposite:

> Our decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege. It is not surprising, then, that neither the State court nor any State officer has suggested otherwise. Indeed, in its brief in this Court, the State submits that it would not, and legally could not, revoke probation for refusing to answer questions calling for information that would incriminate in separate criminal proceedings.

Murphy, 465 U.S. at 438.

Mr. Murphy's situation was dramatically different than Mr. Lile's because Mr. Murphy never invoked his rights. In contrast, Mr. Lile invoked his rights, refused to sign the Admission of Guilt or to catalog his prior offenses, and chose to remain silent.

Similarly, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), Mr. Palmigiano was not punished solely for his refusal to testify at his disciplinary hearing. Instead, the disciplinary board merely weighed his silence against him:

> [A] prison inmate in Rhode Island electing to remain silent during his disciplinary hearing, as respondent Palmigiano did here, is not in consequence of his silence automatically found guilty of the infraction with which he has been charged. . . . It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary board.

Id. at 317. The Tenth Circuit was correct in suggesting that Mr. Lile's claim was substantially different than Mr. Palmigiano's. Pet. App. 19a. Mr. Lile's refusal to provide incriminating information *automatically* results in a transfer to maximum security and other sanctions; there is no other possible result.

The State urges that it is not Mr. Lile's invocation alone that leads to transfer, but the fact that he is (1) a convicted sex offender (2) who should participate in SATP but (3) who refuses to give away his Fifth Amendment rights. It is this combination of factors that leads to sanctions. Pet. Brief 26. The reasoning is specious; one's status as a convicted sex offender would thereby subject the inmate to any and all recommended programs, no matter how awful their constitutional infirmities.

Furthermore, the State's notion that it punished Mr. Lile because of his refusal to participate in programming and not because he invoked his rights is not supported by the facts of this case. The State seeks the right to self-label its own conduct so that it can get around the constitutional violation. The Tenth Circuit rejected this argument.

Pet. App. 19a ("Plaintiff's *refusal to submit to the interrogation* – to disclose the required information about his sexual history – standing alone, would certainly result in the transfer to [maximum security] and the corresponding loss and restrictions of many privileges.") (emphasis added); Pet. Brief 20a (the State "would impose sanctions solely because Plaintiff wishes to remain silent and invoke his Fifth Amendment right against self-incrimination. . . . ").

The State's reliance on *McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997), is similarly misplaced. In *McMorrow*, the court found no violation because the law regarding Mr. McMorrow's claims was not clearly established at the time of the alleged violation; as a result, qualified immunity protected prison officials. *Id.* at 434, 436. Moreover, the court noted that Mr. McMorrow's complaint stated that he was being sanctioned for refusing to *admit guilt*, not because of his invocation of rights. *Id.* at 436.[11] In the present case, the State acknowledges that Mr. Lile's claims arise because he has invoked his Fifth Amendment rights. Pet. Brief 2.

Similarly, *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) is equally distinguishable. Mr. Asherman was not told or threatened at the time he asserted his Fifth Amendment right that he would lose his home release status if he refused to answer questions about his crime; a prison disciplinary board decided this only *after* he

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[11] Also in *McMorrow*, the sanctions imposed upon were truly *incentives*. Had he participated in SATP, he could have become eligible for work release and for "less restrictive confinement." *McMorrow*, 109 F.3d at 434.

refused to incriminate himself. *Id.* at 980-81. "In pursuing the inquiry, the Commissioner took no action to impair Asherman's self-incrimination privilege." *Id.* at 983. Unlike the state in *Asherman*, the State readily concedes that, for Mr. Lile, any refusal to answer incriminating questions during SATP will automatically result in losing his security level and will be moved to Level I.[12]

B. Courts analyze *ex post facto* and Fifth Amendment claims differently.

The *ex post facto* clause concerns laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). The State suggests that what is considered "punishment" under the *ex post facto* clause should also be considered punishment for purposes of the Fifth Amendment. Because Mr. Lile's sentence is not increased because of invoking his Fifth Amendment rights, the State suggests he has suffered no punishment.

The State relies upon *Kansas v. Hendricks*, 521 U.S. 346 (1997), in which this Court rejected both double jeopardy and *ex post facto* claims. In its analysis of Mr. Hendricks'

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[12] *Asherman* and *McMorrow* (as well as *Murphy*, *Baxter*, and *Woodard*) are further distinguishable from Mr. Lile's case because the sole issue in each was the requirement that they discuss *only* the underlying crime for which they had been convicted – not other past offenses that they had not been charged with. Because of the sexual offense history form in the SATP, Mr. Lile faces a far more incriminating situation and far more severe penalties of additional time to serve if the State prosecutes him for any uncharged offenses listed on his sexual history form.

double jeopardy claim, this Court noted that the Double Jeopardy Clause prohibits the state from "punishing twice, or attempting a second time to punish criminally, for the same offense." *Id.* at 369 (citing to *Witte v. United States*, 515 U.S. 389, 396 (1995)). This Court rejected Mr. Hendricks' double jeopardy claim, because the civil commitment proceedings did not amount to a second prosecution; as a result, there could be no second punishment or possibility for additional criminal time. *Id.* at 369-70. Having determined there was no additional prosecution or punishment possible, this Court dismissed the *ex post facto* claim. *Id.* at 370-71; *see also Seling v. Young*, 531 U.S. 250 (2001) (rejecting inmate's double jeopardy and *ex post facto* claims regarding Washington's sexually violent predator statute).

The State concludes, apparently, that so long as an inmate's sentence is not extended, there can be no "punishment." Accordingly, the State believes it may change the nature of the prisoner's confinement with impunity once he invokes his Fifth Amendment rights. All it may not do is keep him in prison for a longer period of time.

Yet, this Court has never held that a prisoner's Fifth Amendment rights are so circumscribed,[13] and the cases

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[13] This Court in *Murphy* specifically noted that a person's Fifth Amendment rights are not affected by the fact he is in prison:

> A defendant does not lose this protection by reason of his conviction of a crime; *notwithstanding that a defendant is imprisoned or on probation at the time he makes the incriminating statements*, if those statements are compelled they are inadmissible in a subsequent

that the State cites do not support this reading of the Fifth Amendment. The court in *Reed v. McKune*, No. 98-3418, 2000 WL 1278488, at *7-8 (D. Kan. July 17, 2000), rejected the inmate's *ex post facto* and Fifth Amendment challenges to SATP. It did not, however, dismiss the inmate's Fifth Amendment claim under the theory that what is punishment for the *ex post facto* clause is punishment for Fifth Amendment claims. *Id.*

Similarly, in *Neal v. Shimoda*, 131 F.3d 818, 827 (9th Cir. 1997), the Ninth Circuit, relying upon *Hendricks*, found no *ex post facto* violation regarding Hawaii's sex offender treatment program. The court also rejected plaintiffs' Fifth Amendment claim, but not because the inmates faced no possibility of additional time in prison as a result of their invocation. *Id.* at 833. There was no Fifth Amendment claim, the court ruled, because the state conceded that no incriminating statements could be used against the inmates in a future criminal proceeding, nor were the inmates required to admit unreported crimes. *Id.* at 833 & n.18. Similarly, in *Brooker v. Warden*, No. 98-466, 1999 WL 813893 (D.N.H. June 22, 1999), the court rejected the inmate's *ex post facto* and Fifth Amendment claims, but did so for different reasons, not because it considered additional prison time the barometer for the claims.[14]

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trial for a crime other than that for which he has been convicted.

465 U.S. at 426 (emphasis added).

[14] Indeed, the court's analysis in *Brooker* supports Mr. Lile's claim here. Mr. Brooker took part in sex offender treatment in the hope that he would *reduce* his security status and increase his chances for parole. The court found that this did not amount to a Fifth Amendment violation. *Brooker*, 1999 WL 813893, at *5

Just as the State asks for a bright-line rule based upon a liberty interest analysis, it once again asks for another rule that says "punishment" can only take but one form – additional time served. Whether it be through a liberty interest or *ex post facto* analysis, the State's insistence on a bright-line rule for Fifth Amendment claims is troublesome. If the Court adopts such a rule in this case, it may encourage the State to pursue incriminating information from any inmate it chooses.

Working from its belief that an admission of guilt is beneficial to an inmate's rehabilitation, the State could begin asking other inmates to admit they committed the crime for which they are in prison as well as all other reported crimes. For example, the State could require all those inmates who committed a violent crime to enroll in an anger management class. Part of the class would require admissions such as the State seeks here. If the inmates do not participate, the State could punish them in any fashion short of an atypical hardship or increased prison time.

Mr. Lile agrees that the penalties at issue will not extend his time in prison. Neither will they affect his eligibility for parole. However, there is nothing in this Court's decisions, and none in those decisions cited by the State, that suggests that what is punishment for *ex post facto* claims should be the same as a penalty under the Fifth Amendment.

("Offering the possibility of earning a benefit is certainly an incentive to participate, but it is not coercion. In other words, the possibility of parole is a carrot, not a stick.").

III. The Tenth Circuit's Decision is Consistent with the History and Origins of the Fifth Amendment.

The State's argument that the Tenth Circuit's decision does not comport with the history and origins of the Fifth Amendment is baseless. Under its view, only those punishments akin to "incarceration, banishment, or mutilation" would constitute impermissible compulsion. Pet. Brief 30-31. Contrary to the State's position, "[t]he roots of the privilege are deeper than the rack and the screw used to extort confessions. They go to the nature of a free man and to his relationship to the state." *United States v. Wade*, 388 U.S. 218, 261 (1967) (Fortas, J., concurring in part and dissenting in part). Indeed, this Court noted in *Ullmann v. United States*, 350 U.S. 422 (1956), that the privilege against self-incrimination "was aimed at a more far-reaching evil – a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Id.* at 427-28.

Courts routinely apply the Fifth Amendment to punishments of all varieties. As this Court noted in *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977), "the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids."

The privilege serves many important purposes:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964) (citations omitted).

This Court unhesitatingly applies the privilege against self-incrimination to compulsions likely deemed trifling in a day of banishment or mutilation. In *Spevack v. Klein*, 385 U.S. 511 (1967), for example, this Court determined that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood" constituted compulsion sufficient to uphold the invocation of the Fifth Amendment. *Id.* at 516. *See also Lees v. United States*, 150 U.S. 476, 480-81 (1893) (applying Fifth Amendment privilege against self-incrimination to $1,000 penalty for importation of illegal aliens).

To Mr. Lile, the sanctions threatened by the State make the assertion of his privilege costly. A Fifth Amendment that protects only against dismemberment or banishment is of little present value to our democracy.

IV. The Factors Set Forth in *Turner v. Safley* Offer the Best Test of Deference and Reinforce the Unconstitutionality of SATP.

Mr. Lile agrees that prison officials, faced with managing the most difficult section of society, deserve some deference in the decisions they make and programs they

conduct. Mr. Lile also agrees that *Turner v. Safley*, 482 U.S. 78 (1987), creates a unique standard of review for constitutional violations relating to rehabilitative prison programming. However, it is unclear what level of deferential review the State would like this Court to employ when reviewing the constitutional claims of inmates.

A. Application of *Turner*.

When the State argues that *Turner* makes sense only when dealing with prison regulations affecting the First Amendment, Pet. Brief 36, the State overlooks the following pronouncement of this Court:

> Our earlier determination to adopt this standard of review was based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. . . . We made quite clear that the standard of review we adopted in *Turner* applies to *all circumstances* in which the needs of prison administration implicate constitutional rights.

Washington v. Harper, 494 U.S. 210, 223-24 (1990) (emphasis added).

Mr. Lile agrees with the State that this Court has never ruled that the application of *factors* from *Turner* is required to determine whether a state's program is reasonably related to its avowed interest in rehabilitation. This Court has suggested, however, that what *Turner* did,

in part, was "identify several factors relevant to this reasonableness determination." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) ("The Court in *Turner* identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry."). As each case involving the constitutionality of prison regulations is typically fact-specific, it makes sense to turn to the *Turner* factors to determine whether the questioned regulation meets the standard of reasonableness. *See Shaw v. Murphy*, 121 S. Ct. 1475, 1479 (2001) (noting that, when employing *Turner*, "courts should consider" the *Turner* factors). *Id.*[15]

B. Timing of the *Turner* Application.

The State suggests that the Tenth Circuit erred in applying *Turner* only upon finding a constitutional violation. Pet. Brief 37-38. Instead, it argues the Tenth Circuit should have considered the issue of deference while determining whether Mr. Lile's rights were violated. The specific language of *Turner* suggests otherwise: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Thus, the Tenth Circuit's approach of finding the constitutional violation before employing *Turner* appears

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[15] This Court's decision in *Shaw* does not, however, entirely resolve the issue of what claims merit *Turner* review. While noting that the *Turner* analysis applies to constitutional claims, this Court also stated that *Turner* provided "the test for evaluating prisoners' First Amendment challenges,. . . . " *Shaw*, 121 S. Ct. at 1479.

appropriate. *See also Boyd v. Petsock*, 795 F. Supp. 743, 745 n.5 (W.D. Pa. 1992) ("*Turner* presupposes a constitutional violation and judges the validity of a regulation which has already been found violative of a prisoner's constitutional rights.").[16]

C. Application of the *Turner* Factors.

1. There is a rational connection between SATP and interests in therapy.[17]

The Tenth Circuit correctly noted that there is a rational connection between SATP and the State's interest in treating sex offenders. However, there is nothing to suggest, as the State does, that the Tenth Circuit failed to give this factor sufficient weight.[18] The State would like the *Turner* analysis to end at this point. It does not. The *Turner* analysis does not end once a court finds in favor of

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[16] In its brief, the State seems to suggest that *Turner* should not be applied *until* a Fifth Amendment violation is found: "Nor, absent any Fifth Amendment violation, is there any reason to engage in a balancing of interests under *Turner*. . . ." Pet. Brief 12.

[17] The State sets forth the factors from *Turner* at page 35 of its brief.

[18] Mr. Lile's claim of innocence presents a dilemma. No one would contest the State's repeated position that an admission of responsibility for a crime makes therapy easier to accomplish. However, it is unclear what the State's position is on therapy if the inmate is innocent. Acknowledging the cliché that there are no guilty inmates, Mr. Lile nevertheless maintains the crimes for which he was convicted were the result of consensual sexual activity. The State has not addressed how its arguments and analysis might change if Mr. Lile *cannot*, as opposed to *will not*, accept responsibility for the crimes for which he was convicted.

the state on this first factor. Indeed, had the Tenth Circuit found in favor of Mr. Lile on this factor, it could have ended the *Turner* analysis. *See Shaw v. Murphy*, 121 S. Ct. 1475, 1479 (2001) ("If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor."). There is nothing to suggest that the converse is true.

It remains unclear how notions of deterrence mesh with the State's interest in rehabilitation. Attorneys General Amicus Brief at 11. It is true that deterrence is an important function of the penal system, but it is unclear how additional punishment for inmates will advance therapeutic goals.

2. There are no other ways for Mr. Lile to exercise his Fifth Amendment rights.

Mr. Lile cannot both participate in SATP and preserve his Fifth Amendment rights. The manner in which SATP is structured prevents this. The states' attorneys general suggest that this factor favors the State because Mr. Lile is not being compelled to incriminate himself. Because SATP is a "voluntary" program, they argue, he has the option of not participating in SATP. At the outset, the argument is circular. According to the states' attorneys general, Mr. Lile has the "voluntary" choice not to participate, and thus exercises his right to remain silent. Unfortunately, the states' attorneys general ignore the fact that the State punishes this so-called "voluntary choice" with transfer to maximum security.

The states' attorneys general do not address a fundamental question of this *Turner* factor: whether there are other ways for Mr. Lile to exercise his Fifth Amendment rights *while* participating in SATP. *Turner*, 482 U.S. at 90 (noting that the issue is whether there are "other avenues" available to the inmate to express his rights while complying with the questioned programming). Because the State will neither permit immunity nor modify its program and treat without forcing an admission of guilt, the answer is "no."

3. There will be little impact to the State if it accommodates Mr. Lile's rights.

Immunity will not adversely affect the operation of SATP, but would likely improve it. Accommodating Mr. Lile's rights (and the Fifth Amendment rights of others) will actually *increase* the chance that more inmates will become rehabilitated. Without the fear of incriminating themselves, more inmates will be inclined to be forthcoming about their sexual offenses. If the State desires "meaningful participation," *see* Pet. Brief at 11-12, then providing immunity better serves their asserted goals.

The states' attorneys general suggest that because other inmates would not be given the same protection, tensions may increase at the prison. However, other inmates are not faced with the same choice: surrender the Fifth Amendment or be dispatched to maximum security confinement and Level I status. If the State chooses to compel incriminating information from other prisoners, it can provide them the same protection – and ward off the chaos.

4. There are workable alternatives for the State to consider.

The State repeats that its main goal is to provide therapy for sex offenders. Mr. Lile agrees that sex offenders would benefit from treatment. However, when presented with a manageable way to secure the therapy it seeks, the State balks.

It is incorrect to suggest that immunity provides a sex offender blanket protection from future prosecution. Immunity will limit the State's ability to prosecute a sex offender for a past crime, but will not preclude it. As this Court noted in *Kastigar v. United States*:

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.' " Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection.

406 U.S. 441, 453 (1972) (quoting *Ullman v. United States*, 350 U.S. 422, 438-39 (1956)). The State could prosecute Mr. Lile, but could not use the "compelled testimony or its fruits" in any subsequent criminal prosecution against him. *See Gardner v. Broderick*, 392 U.S. 273, 276 (1968).[19]

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[19] Immunized disclosures would also equip the State with a powerful way to make sure that such inmates are not permitted to avoid responsibility for their past crimes. If an inmate – even one given immunity – admitted past uncharged sex offenses, the State could use these against the inmate in a civil commitment

Another alternative the State can use at a *de minimis* cost to SATP is to turn the State's sanctions into benefits. The State could maintain SATP – without providing immunity – if it placed newly-convicted sex offenders in maximum security upon arrival to prison. Then, SATP would operate as a true incentive program. If Mr. Lile wanted out of maximum security, the State would allow him to do so only upon *full* participation in SATP. If not, he would remain in maximum security. This would be in keeping with the philosophy that Mr. Lile should not suffer "any sanction" for invoking his Fifth Amendment rights. *Spevack v. Klein*, 385 U.S. 511, 515 (1967); *see also McMorrow v. Little*, 109 F.3d 432, 434 (1997) (discussing treatment program that gave incentives of work release and "less restrictive confinement" as inducements to participate).[20] If the State cannot strip Mr. Lile of anything, the State would not be sanctioning him for exercising his Fifth Amendment rights. *See also infra*, Section V.

V. The State's Interests Do Not Warrant Denying Mr. Lile His Fifth Amendment Rights.

The State's concern that Mr. Lile will be unfairly occupying the bed of an inmate who wants to participate

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hearing under the Kansas Sexual Predator Act. *See* Kan. Stat. Ann. 59-29a01 *et seq.* (1999). Such admissions would be a powerful tool for the State to keep dangerous or repeat sex offenders away from society and to continue to provide further rehabilitation.

[20] Similarly, the State could offer sex offenders in medium security a chance to get to minimum security or could award good-time credits for those who complete SATP.

unconditionally in SATP will not exist if this Court affirms the Tenth Circuit decision. If this Court affirms, Mr. Lile *will* participate unconditionally in SATP. He will make any admission requested by the State. He will participate in frank group therapy discussions. His participation in the program will be no different than any other inmate taking part in SATP. *The operation of SATP will remain unchanged*. Furthermore, the State can prosecute Mr. Lile for past crimes notwithstanding immunity,[21] it can use his admissions in civil commitment hearings, and it can punish him if he still refuses to participate in SATP. *See supra*, Section IV.

The State minimizes the grave consequences of providing incriminating information during SATP. Although the State apparently has yet to bring charges against anyone from information obtained in SATP, it has made clear that it will indeed forward information about prosecutable offenses to the authorities. Pet. App. 7a. That prosecution has not happened in Kansas does not mean it cannot happen.

Certainly, other states have used incriminating statements from their sex offender treatment programs to bring *additional* charges against those undergoing treatment. *See, e.g., Montana v. Fuller*, 915 P.2d 809, 811 (Mont.

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[21] It is misplaced to suggest, as the State does, that prosecution for Mr. Lile's past crimes is unlikely based upon statute of limitation issues. Pet. Brief 41 n.12. There is no statute of limitation for murder. *See* Kan. Stat. Ann. 21-3106(1) (2000). Moreover, the State would have two years from the time Mr. Lile admitted a sexual offense to prosecute if he took any affirmative steps to conceal the crime *See* Kan. Stat. Ann. 21-3106(8)(c) (2000).

1996) (noting that the state prosecuted defendant for two counts of sexual assault and one count of rape after presenting information on his sexual history during sex offender treatment program); *Vermont v. Cate*, 683 A.2d 1010, 1018 (Vt. 1996) (noting that the prosecutor stated at oral argument that he would charge defendant with perjury if he signed the admission of responsibility form used in state's sex offender treatment program); *Oregon v. Tenbusch*, 886 P.2d 1077 (Or. Ct. App. 1994) (prosecuting defendant for two counts of sexual abuse based on statements made during a polygraph test used in his sex abuse treatment program).

The State has a number of options and need not abandon its rehabilitative programs. As the Tenth Circuit noted – and as several other courts addressing this issue have noted – the State could provide immunity for incriminating statements made during SATP. Pet. App. 30a (calling this option "the most obvious and easy alternative to the challenged policy," and noting that some states already attach the privilege to such statements through statutes); *see also Mace v. Amestoy*, 765 F. Supp. 847, 851-52 (D. Vt. 1991); *Cate*, 683 A.2d at 1019.[22]

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[22] Two cases cited by the State in its Petition for Certiorari for the proposition that there is no Fifth Amendment violation here actually support the concept of immunity or confidentiality. *Tedder v. Francke*, 931 F.2d 897, 1991 WL 65497, at **2 (9th Cir. Apr. 24, 1991) ("An inmate patient's disclosures to a treating therapist are unavailable to the state or federal government to use in a court proceeding. If he chose to undergo the treatment, [plaintiff] would not be providing the state with incriminating evidence."); *Guilkey v. Holden*, 865 F.2d 258, 1988 WL 134526, at **1 (6th Cir. Dec. 16, 1988) (dismissing plaintiff's Fifth Amendment claim because "plaintiff's admission would

Alternatively, the State could make SATP truly voluntary, without any penalties or sanctions for invoking Fifth Amendment rights, premising participation upon a system of benefits. In reviewing a Fifth Amendment challenge regarding guilty pleas, this Court noted in *Brady v. United States*, 397 U.S. 742 (1970):

> We cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

Id. at 753.[23]

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be a privileged communication not subject to disclosure in any civil or criminal proceeding"). *See also* Ky. Rev. Stat. Ann. § 197.440 (2000) ("Communications made in the application for or in the course of a sexual offender's diagnosis and treatment in the program between a sexual offender or member of the offender's family and any employee of the department who is assigned to work in the program, . . . shall be privileged from disclosure in any civil or criminal proceeding, . . . ").

[23] The United States, in its amicus brief, is wary that a ruling from this Court upholding the decision of the Tenth Circuit will harm its federal sex offender treatment program. United States' Brief 26-27. It will not. The Federal Bureau of Prisons' program is truly voluntary. If inmates do not want to participate in the program, nothing happens to them. *Id.* If they decide to participate, they are transferred to a facility in North Carolina for treatment. *Id.* If officials subsequently remove them from the program, the inmates return to their previous facility. *Id.* As a result, prison officials do not make an inmate's situation

Similarly, as the Federal Sentencing Guidelines provide, if defendants "acknowledge their responsibility" for their crimes, they can receive a lesser sentence (i.e., they can earn a reward or receive a benefit as opposed to suffering a punishment or penalty). The Second Circuit, in analyzing whether the Sentencing Guidelines Section 3E1.1 violated the Fifth Amendment, noted that "one of the goals of sentencing is rehabilitation, and a defendant's admission of responsibility or expression of contrition 'is often a significant first step towards his rehabilitation and, for that reason, deserving of a possible *reward* in the form of a lessened sentence.' " *United States v. Parker*, 903 F.2d 91, 105 (2d Cir. 1990) (quoting *Smith v. Wainwright*, 664 F.2d 1194, 1996 (11th Cir. 1981)) (emphasis added).

When considering the Federal Sentencing Guideline's provision of a lesser sentence for admitting responsibility for a crime, the Tenth Circuit noted the difference between a "penalty" for invoking one's Fifth Amendment rights versus a "reward":

> [T]he denial of a downward adjustment under § 3E1.1 does not constitute a penalty or an enhancement of a sentence. There is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level. "It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to

in the prison system worse if he refuses to participate in treatment.

> administer additional punishment to a defendant who by his silence has committed no additional offense."

United States v. Rogers, 921 F.2d 975, 982-83 (10th Cir. 1990) (quoting *United States v. Stratton*, 820 F.2d 562, 564 (2d Cir. 1987)).[24]

The rehabilitation of sex offenders is an important goal. However, it need not and should not come at a high constitutional price. SATP is unconstitutional; it violates Mr. Lile's Fifth Amendment right against self-incrimination. But, it is easily repaired. If the State will grant immunity to its participants, it may continue its rehabilitative program and continue its ability to commit and prosecute those involved with sexual offenses. Constitutional rights can thereby coexist with the State's goals of therapy and deterrence. They need not be in conflict.

As this Court recently reiterated in *Mitchell v. United States*, 526 U.S. 314, 329 (1999), "the central purpose of the privilege – to protect a defendant from being the unwilling instrument of his or her own condemnation – remains of vital importance." Here, Mr. Lile will be the "unwilling instrument of his own condemnation" if this Court allows the State to force him into SATP.

[24] This Court has recognized that there are distinct differences between granting benefits like parole versus revoking parole. " '[T]here is a human difference between losing what one has and not getting what one wants.' " *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 10 (1979) (quoting Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975)).

CONCLUSION

Mr. Lile respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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